Bank of Commerce v Tanjung Petri Enterprise

HIGH COURT (JOHORE BAHRU) — ORIGINATING SUMMONS NO 24–370 OF 1990
JAMES FOONG J
17 MARCH 1992

Civil Procedure *— Receiver — Appointment by way of originating summons — Whether application could be made without there being a pending suit — Rules of the High Court 1980 O 30 r 1 — Specific Relief Act 1950 s 43*

The applicants are bankers who had granted a loan of $2m to the respondents, a housing development company. As security for the loan, the respondents charged to the applicants various documents of title by way of a first legal charge. The applicants alleged that the respondents had failed to service the loan and further alleged that the respondents had stopped work on the housing project they were engaged to do due to financial difficulties. The applicants applied by way of an originating summons for the appointment of a receiver/manager of the respondents. The respondents objected to the application and a preliminary issue arose to be decided as to whether the applicants' application was wrong in law and should be set aside. The respondents argued that the application was wrong in law as it was made independently and did not arise from a matter pending suit. The applicants replied in its affidavit that there was already a pending suit filed against the respondents. The applicants further argued that its application could be cured by O 2 rr 1 and 3 of the Rules of the High Court 1980 ('the RHC').

Held, dismissing the application:

(1) The application for the appointment of a receiver/manager under O 30 r 1 of the RHC must be made when there is a pending suit as the objective of such appointment was to preserve any property where litigation is pending before the court decides on the rights of the parties.

(2) The right to apply for the appointment of a receiver/manager to preserve such property is not a cause of action and cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the respondents. This is also clear from s 43 of the Specific Relief Act 1950.

(3) The applicants' application was not made under the pending suit against the respondents. The writ was not annexed to the affidavit in support of the application nor were the particulars of the writ disclosed to enable the court to determine whether the issues were similar to the application for appointment. Under the circumstances, the court could not find that the application was related to that suit.

(4) From the very start, this application was wrong and bad in law. It was not an irregularity but went to the heart and core of the

matter where one had no right whatsoever to commence such an application without a lis pendens.

[Bahasa Malaysia summary

Pemohon adalah syarikat bank yang telah memberikan satu pinjaman $2 juta kepada responden, sebuah syarikat pemaju perumahan. Sebagai cagaran bagi pinjaman itu, responden telah mencagar kepada pemohon beberapa dokumen hakmilik melalui cagaran undang-undang pertama. Pemohon mendakwa bahawa responden telah gagal menunaikan servis pinjaman itu dan seterusnya mendakwa bahawa responden telah memberhentikan kerja atas projek perumahan di mana mereka digaji untuk membuat kerja akibat kerumitan kewangan. Pemohon memohon melalui saman pemula untuk perlantikan seorang penerima/pengurus bagi responden. Reponden telah membantah terhadap permohonan itu dan satu isu permulaan telah timbul untuk keputusan sama ada permohonan pemohon adalah salah di sisi undang-undang dan harus diketepikan. Responden berhujah bahawa permohonan itu adalah salah di sisi undang-undang kerana ia dibuat secara bebas dan tidak terbit daripada satu perkara yang menantikan guaman. Pemohon menjawab dalam afidavitnya bahawa sudah ada satu guaman yang difail terhadap responden. Pemohon selanjutnya berhujah bahawa permohonannya boleh diselamatkan oleh A 2 kk 1 dan 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Diputuskan, menolak permohonan itu:

(1) Permohonan untuk perlantikan penerima/pengurus di bawah A 30 k 1 KMT harus dibuat apabila terdapat satu guaman yang belum selesai kerana tujuan perlantikan sedemikian adalah untuk mengekalkan sebarang harta sementara menantikan litigasi sebelum mahkamah memutuskan tentang hak pihak-pihak itu.

(2) Hak untuk memohon bagi perlantikan seorang penerima/pengurus untuk mengekalkan harta sedemikian bukanlah satu kausa tindakan dan tidak boleh berdiri secara sendiri. Ia bergantung kepada adanya satu kausa tindakan yang wujud lebih awal terhadap responden. Ini adalah jelas dari s 43 Akta Relif Spesifik 1950.

(3) Permohonan pemohon tidak dibuat di bawah guaman yang belum selesai terhadap responden. Writ itu tidak dilampirkan kepada afidavit yang menyokong permohonan itu. Juga butir-butir writ itu tidak dikemukakan untuk membolehkan mahkamah menentukan sama ada isu-isu itu adalah sama dengan permohonan untuk perlantikan. Dalam keadaan sedemikian, mahkamah tidak dapat membuat keputusan bahawa permohonan itu bersangkutan dengan guaman itu.

(4) Dari mula lagi, permohonan ini adalah salah dan buruk di sisi undang-undang. Ia bukannya satu luar aturan tetapi menyentuh teras perkara itu di mana seseorang tidak berhak sama sekali memulakan permohonan sedemikian tanpa satu lis pendens.]

[*Editorial Note*: The applicants have appealed to the Supreme Court vide Civil Appeal No 02–167–92.]

Case referred to
1 *Salter v Salter* [1896] P 291 (folld)

Legislation referred to
Specific Relief Act 1950 s 43
Rules of the High Court 1980 O 2 rr 1, 3, O 30 r 1

Ibrahim Hashim (*Hassan Ibrahim & Co*) for the applicants.
Yeo Yang Poh (*Tan Hoon & Tee*) for the respondents.

James Foong J: This is an application of the applicants by way of an originating summons, made ex parte for the appointment of a receiver/manager into the respondent company under O 30 r 1 of the Rules of the High Court 1980 ('the RHC'). When this matter finally came up for hearing before me, it was made inter partes.

The respondents are a housing development company engaged in the development of a housing estate by the name of Taman Mawai in Johore. The applicants are bankers who had granted a loan $2m to the respondents. As security for the repayment of the said loan, various documents of title belonging to the respondents are charged to the applicants by way of a first legal charge.

The applicants alleged that the respondents have failed to service the loan granted to the respondents. Further, it is also alleged that the respondents have stopped work on the said housing project and are unable to complete the said project due to financial difficulties. The respondents objected to this application.

During the hearing of this application both counsel for the applicants and the respondents seemed to have agreed that there is a preliminary issue that must first be settled before the merits of the case should be considered. I am in total agreement with this approach.

The preliminary issue in this case relates to the respondents' objection that the applicants' application is wrong in law and should be set aside.

The applicants as stated earlier, made this application to this court by way of an originating summons for the appointment of a receiver/manager of the respondents. This, the respondents argued is wrong in law for the reason that this application cannot be made in this manner independently and not arising from a matter pending suit.

After careful consideration of the submissions by both counsel for the applicants and the respondents, I find that the application for the appointment of a receiver/manager under O 30 r 1 of the RHC must be made when there is pending suit.

The objective of the appointment of a receiver/manager under the circumstances provided for in the RHC is to preserve any property where litigation is pending, before the court decides on the rights of the parties. This is to prevent any scramble among those entitled to the property which is not in anyone's actual possession or, where misconduct or maladministration is alleged against persons who are in a fiduciary capacity.

A Such right to apply for the appointment of a receiver/manager to preserve the said property is not a cause of action. It cannot, like an interlocutory injunction stand on its own. It is dependent upon there being a pre-existing cause of action against the respondents. When there is no pre-existing cause of action, the court cannot grant such an application until a cause of action is filed and such application is made thereunder.

B This court is in full agreement with the decision of *Salter v Salter*[1] where it rejected an application for the appointment of a receiver without a cause or matter pending suit. This court further considers the views of Rigby LJ in that case as sound law where he said as follows;

C > But in order to obtain a receiver you must approach the court in a proper way: the intervention of the court cannot be asked for except in a proper proceeding. Unless there is a lis pendens there is no way of approaching the court.

Even s 43 of the Specific Relief Act 1950 ('the Act') relating to the appointment of the receiver by the court uses the words 'pending a suit'. Section 43 of the Act reads as follows:

D > The appointment of a Receiver pending a suit is a matter resting in the discretion of the court.

Therefore, it follows that such an application for the appointment of a receiver must be dependent or arising out of a pending suit.

E The applicants' counsel informed this court that there is an actual suit pending hearing No 22–149–1990 filed against the respondents in this High Court. Though this information is stated in the affidavit filed in support of the application, the question remains as to why this application was not made thereunder. The writ filed against the respondents is not annexed to the affidavit filed in support of this application nor are the

F particulars of the said writ disclosed to enable this court to determine whether the issues are similar to this application for appointment. Under these circumstances, this court cannot entertain the submission that this application is related to that civil suit.

The learned counsel for the applicants also urged this court to exercise

G its discretion under O 2 rr 1 and 3 of the RHC, where failure to comply with requirements of the Rules of the High Court should be treated as an irregularity and should not nullify the proceedings. I cannot agree to this application of the learned counsel for the reason that from the very start this application is wrong and bad in law. It is not an irregularity of the rules but it goes to the heart and core of the matter where one has no right whatso-

H ever in these circumstances to commence such an application without a lis pendens.

I therefore dismiss the application with costs.

Application dismissed.

I Reported by Wong Kian Kheong